

## ESSAY

# REFLECTIONS ON ABORTION: A ROLL OF THE DICE IN LOUISIANA

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### I. INTRODUCTION

IT is hard to say anything new or different about the abortion controversy. But I will make a modest attempt to develop a woman-centered perspective on abortion, with particular application to the recently enacted Louisiana criminal abortion statute.<sup>1</sup> This Essay is deeply political and personal, as it draws on my own reproductive experiences.

Despite claims by the conservatives that the Supreme Court's relaxing of the abortion-privacy standard would make the abortion debate less rhetorical,<sup>2</sup> there is no evidence of that result. I live in the heart of rhetoric-land — the state of Louisiana — where I have seen the state pass legislation which criminalizes nearly all abortions. In other essays, I have talked about the need to develop "good faith" dialogue on the abortion issue.<sup>3</sup> A good faith dialogue is one embedded in respect for the people affected by the issue under discussion as well as the arguments made on each side of the issue. In order for a good faith dialogue on the abortion issue to exist, pro-life advocates must respect the well-being of women and pro-choice people must respect the value of prenatal life. As I have discussed elsewhere, abortion discussions rarely reflect such good faith.<sup>4</sup> In the case of the Louisiana criminal abortion statute, I tried to write a brief in the Fifth Circuit that engaged in good faith dialogue on the abortion issue.<sup>5</sup> While not denying the importance of valuing life in all its various forms, I try to show that the Louisiana statute reflects enormous disrespect for women's well-being while not increasing our valuation of life. Such disrespect, I argued, violates the sex-

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1. 1991 La. Acts 26 (codified at LA. REV. STAT. ANN. § 14:87 (West Supp. 1992)).

2. See, e.g., Brief for the United States as Amicus Curiae Supporting Appellants at 21, *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989) (No. 88-605) ("As long as the various factions continue to look to the courts, however, a constructive dialogue will be impossible.").

3. See Ruth Colker, *Abortion & Dialogue*, 63 TUL. L. REV. 1363, 1363 n.1 (1989).

4. See Ruth Colker, *Feminist Litigation: An Oxymoron? — A Study of the Briefs Filed in William L. Webster v. Reproductive Health Services*, 13 HARV. WOMEN'S L.J. 137 (1990).

5. Brief for Black Women for Choice et al. at 13-17, *Sojourner T. v. Buddy Roemer*, No. 91-3677 (5th Cir. filed on Oct. 18, 1991).

equality component of the Fourteenth Amendment of the United States Constitution.

In this Essay, I will not repeat all of my arguments to the Fifth Circuit. I will try to explain, however, how the Louisiana statute is a shocking example of the lack of respect for women's well-being that can be reflected in a so-called pro-life position. That lack of respect for women's well-being is basic to the statute's structure and substantive position. More subtly, however, I will show how the statute profoundly reflects a man's rather than a woman's experience of pregnancy. Given the virtual lack of women's representation in the Louisiana legislature, the male-centered perspective should not surprise us. Because, as I will argue, that male-centered perspective is pervasive due to women's silence about their own pregnancies, I will try to break that silence in this Essay. I hope that other women will join me and discuss their pregnancies so that we can begin to remember rather than romanticize pregnancy and make the true realities of pregnancy a part of the public consciousness.<sup>6</sup>

## II. LACK OF RESPECT FOR WOMEN

Four aspects of the Louisiana statute make it exceptionally regressive and disrespectful of women's well-being. First, the statute attempts to prevent termination of pregnancy "from the moment of conception."<sup>7</sup> Because nearly all birth control devices, aside from the diaphragm and condom, operate between the time of conception (when the egg is fertilized) and implantation (when the fertilized egg implants onto the uterine wall), the statute would appear to ban most contraceptives. The statute would ban no contraceptive used by men, but, interestingly, would ban the most popular devices used by women, increasing women's dependence upon men. Irrespective of how one feels about abortion, there is no excuse for preventing women from having access to safe and effective contraception.

Second, the statute only provides for an abortion exception in the case where a woman faces *imminent death*, rather than *substantial harm to her health*, from continuation of her pregnancy.<sup>8</sup> Nearly every other state and western country that has passed an anti-abortion measure in the last century has included a health exception.<sup>9</sup> Louisiana's decision to include an immi-

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6. An excellent example of such a discussion of pregnancy is ADRIENNE RICH, *OF WOMEN BORN* (10th anniv. ed. 1986).

7. 1991 La. Acts 26 § 1 (codified at LA. REV. STAT. ANN. § 14:87 (West Supp. 1992)).

8. Section 1B(2) provides an exception when the "physician terminates a pregnancy for the express purpose of saving the life of the mother." *Id.* § 1B(2) (codified at LA. REV. STAT. ANN. § 14:87B(2) (West Supp. 1992)).

9. The recently challenged Pennsylvania statute has an overriding umbrella clause which contains a "medical emergency" exception. 18 PA. CONS. STAT. § 3204 (1991). The recently enacted Utah statute provides for an abortion exception in the event of rape or incest, grave damage to the woman's health, or grave fetal defects. UTAH CODE ANN. § 76-7-302(2)(1991). Similarly, the recently enacted Guam statute provides an abortion exception when two physicians determine that continuation of a pregnancy would impose a substantial risk to a pregnant woman's life or health. 9 GUAM CODE ANN. § 31.20 (1991). The European countries have also been consistent in protecting women's health when regulating abortion. *See generally*

ment death exception, but not a health exception, was quite deliberate. The Louisiana Senate specifically rejected a health exception, which was reported out of committee, by a vote of eight to thirty.<sup>10</sup> In addition, the Louisiana Senate rejected an abortion exception for women with HIV infection or AIDS, which was also reported out of committee, by a vote of twelve to twenty-six.<sup>11</sup> These votes were taken in the face of dramatic evidence about the negative health implications of pregnancy for many women — women with congestive heart failure, congenital heart disease, renal failure, kidney disease, stage IV or V breast cancer, as well as HIV infection.<sup>12</sup> Thus, one could say that the legislature consciously voted to shorten the life expectancy of these women, as well as cause them to suffer dramatic health effects, in order to protect the embryo at the moment of conception. It takes a tremendous disrespect for the value of women's lives to insist that they undergo compulsory childbirth and enormous, negative health consequences to protect embryonic life. It is therefore not surprising that Louisiana has the lowest representation of women in the state legislature of any state (three women in the House, and one woman in the Senate; not one of the women voted to override the Governor's veto of the statute).

Third, the statute contains a virtually meaningless rape and incest exception.<sup>13</sup> A woman who is a victim of rape must go to doctor within five days and seek medical treatment for venereal disease. (The rape victim, of course, is expected to pay for this treatment.) The physician is also required to determine whether she was already pregnant at the time that the rape occurred, which is an impossible requirement if she had consensual intercourse within two weeks of the rape. This physician may *not* be the physician who later performs an abortion upon her, if she desires an abortion. Thus, she must use a gynecologist, other than her personal gynecologist, to perform the rape exam or the abortion, adding to her rape trauma. Additionally, the woman must report the rape or incest to law enforcement authorities within seven days. Aside from the unrealistic expectation that adult women be able to comply with these requirements, imagine how unrealistic these requirements are for a twelve year old victim of incest. If each of these requirements has been met, the physician who has concluded that the pregnant woman is a victim of rape or incest is permitted to perform an abortion within thirteen weeks of conception. Of course, virtually no rape or incest prosecutions occur within thirteen weeks of the alleged crime, so there is no way a physician can know with certainty that he or she has performed an abortion on an actual rape or incest victim, thereby allowing the physician to avoid criminal liability for performing the abortion.

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Rebecca Cook, *Abortion Laws and Policies: Challenges and Opportunities*, 3 INT'L J. GYNECOL. OBSTET. 61, 62-65 (1989).

10. OFFICIAL JOURNAL OF THE SENATE OF THE STATE OF LOUISIANA 19 (June 4, 1991) [hereinafter JOURNAL].

11. *Id.* at 14.

12. See, e.g., Testimony by Dr. Helen Ullrich before Louisiana Senate Committee on Health and Welfare 38-39 (May 29, 1991).

13. 1991 La. Acts 26 § 1B(3) (codified at LA. REV. STAT. ANN. § 14:87B(3) (West Supp. 1992)).

Finally, the statute exempts from its coverage women who self-induce abortions.<sup>14</sup> No justification consistent with the statute's purported objective can explain this exception. Self-induced abortions are likely to destroy both the woman's and fetus' lives. On the other hand, such an exception supports a nineteenth century "pedestal" view of women by leaving them free from the criminal law.

Louisiana purports to have enacted this statute to protect life. But as the statute aptly says in its preamble, the legislature was only concerned about life from the moment of conception *until birth*. Unfortunately, the alleged concern did not extend to the period *after birth*. Louisiana ranks nearly last in the United States in infant mortality, low birth weight babies, and lack of prenatal care.<sup>15</sup> Nevertheless, the Louisiana Senate rejected an amendment to the abortion statute, by a vote of fourteen to twenty-three, that would have raised the Medicaid eligibility for pregnant women and their children.<sup>16</sup> Rather than do anything meaningful to assist the women or children of the state, Louisiana chose to impose compulsory childbirth upon women.

Louisiana has not voluntarily moved into the twentieth century in the area of gender relations. It was not until 1979, under court order, that Louisiana got rid of its "head and master" statute, thereby giving married women the opportunity to control their marital property.<sup>17</sup> The recently enacted Louisiana criminal abortion statute is unfortunately an attempt to return the women of Louisiana to their nineteenth century role in society.

In the Supreme Court's recent *Webster v. Reproductive Health Services*<sup>18</sup> decision, Chief Justice Rehnquist suggested that women need not worry about the states having increased power to regulate abortion.<sup>19</sup> Given women's numerical majority in society, he predicted that the Supreme Court's recent, conservative decisions in the abortion area would not be treated by state legislatures as "an invitation to enact abortion regulations reminiscent of the dark ages."<sup>20</sup> Unfortunately, Chief Justice Rehnquist failed to comprehend that the Louisiana legislature would try to move the clock back to the dark ages, endangering the lives of women. The Governor of Louisiana, Buddy Roemer, vetoed the Louisiana statute, stating that it "dishonors women."<sup>21</sup> The legislature, however, chose to continue that dishonor by overriding his veto. Unless the federal courts choose to protect the lives and health of the women of Louisiana, they will be facing much worse results than dishonor.

Thus, we can readily conclude that the statute fails to respect women's well-being. It does not purport to respect women, nor does it. As I have

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14. *Id.* § 1A(2) (codified at LA. REV. STAT. ANN. § 14:87A(2) (West Supp. 1992)).

15. See Statement of Senator Cleo Fields before Louisiana Senate Committee on Health and Welfare 49 (May 29, 1991).

16. JOURNAL, *supra* note 10, at 48-49.

17. See 1978 La. Acts 627, *repealed by* 1979 La. Acts 709 § 5 *replaced by* 1979 La. Acts 709, 710, 711; see also Kirchberg v. Feenstra, 450 U.S. 455 (1981).

18. 492 U.S. 490 (1989).

19. *Id.* at 521.

20. *Id.*

21. N.Y. TIMES, June 15, 1992, at A1.

argued elsewhere, such profound disrespect for women's well-being should violate the equality component of the Fourteenth Amendment of the United States Constitution.<sup>22</sup>

### III. WOMAN-CENTERED PERSPECTIVE

So far, I have relied on the kinds of arguments that I made to the Fifth Circuit in the Louisiana abortion case. I now turn to some more personal arguments that I did not make in court but I believe also help demonstrate the male-centered nature of the Louisiana statute. This more personal discourse discusses the statute's lack of a woman-centered perspective.

Before doing so, I need to offer a few caveats. First, I worry about the kind of argument that I am now going to make, because it sounds so biological. Biological arguments about women's physical autonomy should not be the basis of a pro-choice perspective<sup>23</sup> because women should seek group-based rather than individualistic arguments about reproductive health. Moreover, I can hear my critics responding that my personal arguments sound "essentialist" to the extent that they rely on biological observations. And essentialism has become one of the dirty words within the feminist movement. Before offering some personal observations, then, I need to explain why these observations are not overly biological or essentialist.

Undoubtedly, the experience of pregnancy has a biological component. More importantly, however, society has helped construct the experience of pregnancy in the way that it treats pregnant women. For example, nausea during pregnancy is a physical experience. I would argue that nausea becomes hidden and trivialized by labelling it as "morning sickness," thereby suggesting that it only occurs in the morning; by expecting women to work during, at least, the first eight months of pregnancy; and by telling women not to disclose the fact of their pregnancy until the end of the first trimester. In talking about the physical experience of pregnancy, I try to show how society modifies and characterizes that physical experience through its rules, regulations, and attitudes. I am therefore talking about the social construction of the physical condition of pregnancy rather than the innate physical condition itself. As with most aspects of women's biology, we have little idea what that biology would be in the absence of social construction.

The other problematic, essentialist aspect of my argument that follows is that it is highly individualistic. Certainly, not all women experience pregnancy exactly as I have. My social class, for example, has greatly lessened the hardships of pregnancy for me. I have been able to receive excellent medical treatment while working in a relatively nonstressful environment while pregnant. Elsewhere, I have discussed the experience of pregnancy for adolescent females<sup>24</sup> and, therefore, understand how privileged my experi-

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22. See, Ruth Colker, *An Equal Protection Analysis of United States Reproductive Health Policy: Gender, Race, Age, and Class*, 1991 DUKE L.J. 324.

23. See Ruth Colker, *Feminism, Theology, and Abortion: Toward Love, Compassion, and Wisdom*, 77 CAL. L. REV. 1011 (1989).

24. See Colker, *supra* note 22.

ence has been in comparison with other women. My experience is one among many, although I believe that it does share many core similarities with that of other women about whom I have read or described elsewhere.

Finally, I should note that I did not consider it appropriate or useful to offer my more personal comments in my brief to the Fifth Circuit. Technically, such arguments would have been inappropriate, because I was purportedly representing others rather than myself. Even if I were a named plaintiff or party, however, I doubt that I would have felt comfortable putting such personal arguments in a brief. It would have been easier to make such personal arguments through the testimony of my clients. Because the trial court judge entered his decision enjoining the enforcement of the Louisiana statute without a trial, there are virtually no personal facts in the record for the purposes of this litigation.<sup>25</sup> I believe that such procedural developments hamper attempts by feminists to develop respect for women's well-being and perspective as part of their case. Unfortunately, there is little that feminist litigators can do about that problem in the face of a hostile judge who denies them the opportunity to develop a factual record. We therefore must use other avenues, like the pages of this law review, to develop such facts.

I have watched the rhetoric in Louisiana over the last year while experiencing three pregnancies. The first two ended in spontaneous abortions<sup>26</sup> — at weeks six and eleven. The third pregnancy has ended successfully with the birth of a child. Of the last twenty months of my life, I have spent all but five of those months pregnant. I have been nauseous<sup>27</sup> and exhausted and frequently wondered why I kept choosing to get pregnant. I had to await the results of an amniocentesis test for my latest pregnancy while realizing how difficult it would be, despite the court's injunction, to obtain a second trimester abortion in Louisiana (if that was my choice). The previous two pregnancies apparently produced nonviable fetuses that nature had a way of eliminating. As traumatic as those spontaneous abortions were, I felt thank-

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25. The plaintiffs consistently sought a trial to develop a factual record; I would suggest that the absence of a trial was a deliberate move on the part of the judge to hamper them on appeal.

26. I am deliberately not using the term "miscarriage." I believe that people refer to spontaneous abortions as miscarriages in order to avoid acknowledging morally that they have experienced an abortion. It is true that some abortions are chosen by nature and others by women; however, they all achieve the same result — the abortion of a fetus from a woman's body. Because the purpose of this Essay is to get people to think connectedly about all first trimester abortions (spontaneous or elective), I do not want to use the misleading term "miscarriage" in this Essay.

27. As many pregnant women can tell you, "morning sickness" is a misnomer. For many women, like myself, the morning is really the only good time of day. I typically wake up feeling alright — at least good enough to eat a modest breakfast and keep it in my system. At about 11 a.m., nausea starts getting much worse, and grows progressively worse throughout the day. From week four to twelve of my pregnancy, I typically vomited once per day except for the dozen or so days when I vomited two to three times. Although I am tall and thin, and had gained four inches in my waist, I also managed to lose ten pounds during this time period. During this time period, I also typically slept twelve to eighteen hours per day. Of course, this only describes the first trimester of a so-called normal pregnancy. Women with a much more severe physical response to pregnancy than I have experienced will be coerced by the Louisiana legislature into continuing with their pregnancies.

ful not to be burdened with the responsibilities of raising a severely handicapped child who would probably have lived a short life filled with suffering. Because nature resolved those pregnancies in favor of abortion, I did not have to make a morally painful decision about those pregnancies.

After one of my spontaneous abortions, the doctor performed a "D&C," a procedure that is strikingly similar to an elective abortion procedure. The difference, some people might argue, is that my D&C was performed on fetal tissue that was not potentially viable. But, had I chosen an abortion earlier in my pregnancy, it turns out that that abortion would still have been performed on fetal tissue that was not potentially viable. I was, in fact, not carrying a potentially viable fetus. The state of Louisiana would allow a doctor to further abort a fetus after my body spontaneously aborted it but would not allow a doctor to abort it before my body spontaneously aborted it.<sup>28</sup>

From my own experience with spontaneous abortions, I would like to make a simple argument — it is unfair and morally unacceptable not to give women the choice of electing an abortion in the first trimester of pregnancy. I have several justifications for this view.

First, let's think about the first trimester of pregnancy. Society tells women not to tell anyone that they are pregnant until the end of the first trimester when the high risk of spontaneous abortions passes. Believe me, the first trimester is terribly difficult for most women. Even if women are not nauseous, they are extremely exhausted. Moreover, if women are well-informed about pregnancy, they know that they have a relatively high risk of spontaneous abortion, estimated to be between fifteen and thirty percent, depending upon whom you ask.<sup>29</sup>

The result is quite convenient for a society that doesn't want to deal with the difficulties of women's pregnancies. Virtually no one knows that the woman is pregnant during the first trimester. If she has a spontaneous abortion, then she must suffer in silence. We can conveniently expect the pregnant woman to keep performing her normal duties inside and outside the home during her pregnancy. In addition, most men and many women stay ignorant of the realities of the first trimester of pregnancy since they are rarely confronted with the pregnancy experiences of women during that time period. Thus, the high rate of spontaneous abortions is a relatively unknown fact.

Now, let's re-examine those facts from the perspective of a woman who does not desire her pregnancy to continue. If Louisiana is successful in convincing the courts to overturn *Roe v. Wade*,<sup>30</sup> then a pregnant woman will have no real choices during her pregnancy. If she desires an abortion but doesn't want to break the law or cannot afford to travel to another state to

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28. Section 1B(1) provides that a physician may terminate a pregnancy in order "to remove a dead unborn child." 1991 La. Acts 26 § 1B(1) (codified at LA. REV. STAT. ANN. § 14:87B(1) (West Supp. 1992)).

29. These estimates are based on discussions with three different gynecologists that I have seen during the course of my pregnancies as well as general reading on the subject.

30. 410 U.S. 113 (1973).

procure an abortion, then her only "choice" is to wait and see whether nature spontaneously aborts her fetus. For about one-fifth of those women, nature will achieve her desired choice. For the remaining four-fifths, the only alternative is bearing an unwanted child.

The state of Louisiana gives a pregnant woman who does not desire to continue with her pregnancy the incentive to do whatever she can to induce a spontaneous abortion, even if those steps might harm or endanger her own life or future reproductive capacity.<sup>31</sup> And why is she forced to take those steps? Because she is too poor to travel to another state where she can procure a legal abortion and she is not "lucky" enough to have experienced a spontaneous abortion. The next twenty years of her life will be dramatically affected by those fortuities.

Let us also think about this scenario from the perspective of the Supreme Court's favorite abortion buzz phrase — potential life. If the Supreme Court overturns *Roe v. Wade* and upholds the Louisiana statute, it will be because the state is constitutionally entitled to value the potential life of the fetus over the woman's right to privacy, equal protection, etc. But, in what sense is a fetus actually potential life in the first trimester? Nature spontaneously aborts more than one-fifth of all pregnancies. From the perspective of a pregnant woman who is well-informed about reproductive health, there is, at best, a possibility of life but not a real potential for life, until the first trimester is completed.

This last observation takes me back to my earlier remarks about the first trimester of pregnancy. Society's conditioning of women to remain silent about their first trimester of pregnancy and spontaneous abortions leads most men to be entirely ignorant of those biological facts. That silence contributes conveniently to a male mode of pregnancy which sees all pregnant women as carrying potential life. In fact, one cannot be confident that women are carrying potential life until the fifteenth week of pregnancy. And, for women over thirty-five, and especially women over forty, one cannot be certain that they are carrying a potential life until the woman receives her amniocentesis results at about week nineteen of pregnancy.

In Louisiana, we have four women in the state legislature — three in the House of Representatives and one in the Senate. Two of these women were elected to their positions in the last year. It, therefore, does not surprise me that the legislature knows virtually nothing about women's reproductive health or well-being. It does not surprise me that the legislature uses a male model of pregnancy which denies the fragility of women's pregnancies for, at least, the first trimester.

The ignorance and disrespect of the Louisiana legislature became more obvious to me when I had the opportunity to debate a state legislator on the Louisiana abortion statute at Tulane Law School. I kept trying to argue from a woman-centered perspective, pointing out the numerous ways that

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31. A self-induced abortion is lawful under the statute. 1991 La. Acts 26 § 1A(2) (codified at LA. REV. STAT. ANN. § 14:87 (West Supp. 1992)).



the statute would harm women's health and well-being.<sup>32</sup>

The legislator responded to my health arguments by repeatedly stating that, if there was a health exception, that a woman who was thirty-nine weeks pregnant would seek an abortion due to a headache! Obviously, his statement reflected no trust and respect for women. In addition, however, it reflected a complete ignorance of the pain that nearly all women experience to make it to week thirty-nine of pregnancy. His comment suggested that the headache was her first indication of discomfort so that she would decide to whimsically abort the fetus at that point. It is hard for me to imagine that a woman would get to week thirty-nine without much more severe discomfort than a headache. Clearly, his fear was that we might actually have to acknowledge all of those discomforts — recognize that pregnancy is not necessarily an easy and joyful process. By demeaning women's claims of discomfort during pregnancy, he wanted to cut off all opportunity for women to raise those discomforts as justifications for an abortion.<sup>33</sup>

I feel very sorry for my poor sisters in Louisiana who are facing an unwanted pregnancy and must leave their fate to a vindictive state legislature that does not want to have to hear about their experience of pregnancy, childbirth, and child care. These women must leave the fate of their pregnancies to nature's roll of the dice, not being able to afford to travel to another state to procure a safe and lawful abortion. Maybe it is not surprising that Louisiana legalized gambling in the same session that it criminalized abortion.

#### IV. CONCLUSION

The Louisiana criminal abortion statute is male-centered in two important but different senses. It quite starkly fails to respect women's well-being. In addition, it ignores a woman's experience of the fragility of pregnancy, especially during the first trimester. I was always told that a woman could not be a "little bit pregnant." In fact, women are a little bit pregnant until their pregnancy passes the high rate of spontaneous abortion at the end of the first trimester. If we had a better understanding of the fragility as well as the discomfort of pregnancy, we might not be so quick to respond to the fact of women's pregnancy with such harsh and absolute rules.

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32. I also refused to allow the legislator to call me "pro-abortion" and eventually resorted to the emotional and personal tactic of standing up with my pregnancy in full view and saying that if I were pro-abortion that I clearly would not be pregnant! That response did force him to start characterizing my position as pro-choice — a minor but important concession.

33. See LA. REV. STAT. ANN. § 14:90, as amended by 1991 La. Acts 158, 289, 753.

